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IN THE

# Supreme Court of the United States

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LINDA LINGLE, Governor of the State of Hawaii, and
MARK J. BENNETT, Attorney General of the State of Hawaii,
*Petitioners*,

v.

CHEVRON USA, INC.,
*Respondent.*

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**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

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## BRIEF *AMICI CURIAE* OF EQUITY LIFESTYLE PROPERTIES, INC., CALIFORNIA MOBILEHOME PARKOWNERS ALLIANCE, THE MANUFACTURED HOUSING EDUCATIONAL TRUST OF ORANGE, RIVERSIDE AND SAN BERNARDINO COUNTIES, MANUFACTURED HOUSING EDUCATIONAL TRUST OF SANTA CLARA COUNTY, AND SEVERAL DISTINGUISHED PROFESSORS OF ECONOMICS IN SUPPORT OF RESPONDENT

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## INTEREST OF *AMICI CURIAE*[1]

Each of the *amici* has a strong interest in a central issue in this case: namely, whether a state restriction on rents for real property must "substantially advance" a legitimate state interest. In particular, *amici* have an interest in rent control restrictions that give rise to a "premium" in mobile home communities. Such a premium exists when the existing tenant of a mobile home plot is able to capitalize and transfer the economic benefits of the rent control regulation to a subsequent lessee, thereby appropriating the supposed public benefit of the rent control restriction. Whether such a rent control restriction violates the Takings Clause was at issue (but not decided) in *Yee v. City of Escondido*, 503 U.S. 519 (1992). The ultimate resolution of that issue may be affected by the constitutional standard adopted by the Court in the instant case.

Equity Lifestyle Properties ("ELS") is the largest owner of properties focused on serving the housing needs of retirees, seasonal and second home-owners, and recreational vehicle owners in the country, with a controlling interest in 270 communities located in 25 states and representing over 100,000 sites. ELS rents its sites to owners of factory-built housing, including manufactured homes, park models, and mobile homes. ELS is a publicly traded real estate investment trust (REIT) that must distribute over 90% of its income annually to its shareholders. ELS shareholders include pension funds, retirees, and other individuals who depend upon income from these investments. ELS has a fiduciary duty to its shareholders to maximize the value of their investment in ELS by charging rents that reflect the value of the real estate in which ELS has invested on their behalf. ELS

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[1] All parties have consented to the filing of this *amicus curiae* brief. No portion of the brief was authored by counsel for a party. No person or entity other than the *amici* signing this brief or their counsel made a monetary contribution to the preparation or submission of the brief.

has over 20 properties in California, of which 13 (representing over 3,700 sites) are currently subject to rent control ordinances. These rent control ordinances limit annual rental increases to the annual increase in the CPI or a fraction thereof – or, in some cases, to no increase at all. ELS estimates that, if these ordinances are constitutional, hundreds of millions of dollars of value will have been taken from its shareholders and transferred to the residents in these communities. ELS has initiated litigation in at least five California jurisdictions challenging their rent control ordinances.

California Mobilehome Parkowners Alliance ("CMPA") is the second largest state-wide association of park owners, dealers, and service and industry representatives. CMPA has been representing the manufactured housing industry for over 15 years. It advocates on behalf of service and industry members and owners of communities consisting of tens of thousands of home sites in numerous mobile home parks in California.

The Manufactured Housing Educational Trust of Orange, Riverside and San Bernardino Counties ("MHET") was incorporated in 1982 as a non-profit trade association representing the owners of mobile home and manufactured housing communities in the Southern California counties of Orange, Riverside, and San Bernardino. There are over 840 mobile home parks and manufactured housing communities in this tri-county area. MHET is dedicated to promoting the manufactured housing and mobile home business industry and to educating manufactured and mobile home owners, community leaders, and the public about manufactured housing community and mobile park issues.

Manufactured Housing Educational Trust of Santa Clara County ("Santa Clara MHET") is a separate association representing the owners of mobile home and manufactured housing communities within Santa Clara County, California. There are a large number of manufactured home communities



in the county, notably located in San Jose (more than 10,000 sites in almost 60 properties), Sunnyvale (almost 4,000 sites in 14 properties), and Mountain View (about 1,800 sites in six communities).

John Quigley is the I. Donald Turner Professor of Affordable Housing and Urban Policy at the University of California, Berkeley. He is Professor of Economics and Public Policy at Berkeley, and he directs the Berkeley Program on Housing and Urban Policy. Edward Glaeser is a Professor of Economics in the Faculty of Arts and Sciences at Harvard University. He is the director of the Taubman Center for State and Local Government and the director of the Rappaport Institute of Greater Boston. Robert Edelstein is a Professor of Business Administration at the Walter A. Haas School of Business at the University of California, Berkeley. He is also Co-Chair of University of California, Berkeley's Fisher Center for Real Estate and Urban Economics. Yongheng Deng is an Associate Professor of Policy, Planning and Development at the University of Southern California, and Research Fellow at the University of Southern California's Lusk Center for Real Estate. He has served as an Economist and Expert at the Office of Federal Housing Enterprise Oversight. Each of these distinguished economists has focused his research and scholarship on real estate finance and housing policy.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner and the United States contend that the Ninth Circuit erred in holding that a state restriction on rents for real property must substantially advance a legitimate state interest. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court stated that "[w]e have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" *Id.* at 834 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). In *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992), the

Court similarly explained that whether a rent regulation constituted a regulatory taking depended upon consideration of the purpose of the regulation and whether circumstances "suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole."

The decision in *Yee* arose in the context of mobile home rent control.[2] Specifically, the Court recognized that consideration of whether a rent control ordinance creates a premium transferable by the tenant – that is, a capitalization of the economic benefits of the rent control regulation – "might have some bearing on whether the ordinance causes a *regulatory* taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." *Id.* at 530. The Court in *Yee* did not decide the issue, however, because it was not fully presented.

In launching a broad assault on the requirement, recognized in *Nollan* and other cases, that a permissible regulatory taking of property must "substantially advance legitimate state interests," Petitioner and the United States seek a ruling that would have implications far beyond the Hawaii statute at issue here. Among other things, the ruling sought could affect the mobile home rent control issue discussed by this Court in *Yee*, by the Ninth Circuit in *Cashman v. City of Cotati*, 374 F.3d 887 (9th Cir. 2004), and by other lower federal and state courts. The purpose of this *amicus* brief is to show, using the related context of mobile home rent control, that it is indeed appropriate to require that, where a regulatory rent restriction on real property may give rise to a premium, such rent

[2] The owner of a mobile home rents a plot of land or "pad" from the property owner. The mobile home owner has special rights with respect to the park owner; the park owner is expected to provide "private roads within the park, common facilities such as washing machines or a swimming pool, and often utilities." *Yee*, 503 U.S. at 523.



restriction must substantially advance a legitimate state interest.

Mobile home rent control often is enacted on the basis of an asserted government interest in increasing the supply of affordable housing. It is firmly established that it has precisely the opposite effect. Economists broadly recognize that, when a rent-controlled leasehold is transferred for a premium, the putative benefits of the regulation are illusory. The existence of a premium means that a new tenant – the purported beneficiary of the regulation – must purchase the supposed benefits of the rent control regulation, likely at their full present discounted value. Thus, the property owners' interest in real estate, which should be captured by such property owner in the form of rent, is transferred to tenants in the form of a premium with the sale of a tenant's home. In that circumstance, the regulation will not confer a benefit on the public or bear a reasonable nexus to a public purpose. In fact, when rent control benefits can be capitalized, access to below-market housing is denied to those who need it most – *i.e.*, those with limited capital or access to capital, who can least afford to purchase or finance the cost of the premium. The effect of such a rent control ordinance simply is to convey a portion of the value of the real property from the property owner to the tenant in residence at the time the regulation is enacted, without making housing more affordable or otherwise advancing any public purpose. It is functionally equivalent to transferring land from one private owner to another.

As set forth in Part I, the economics of mobile home rent control demonstrate that this Court should reject Petitioner's invitation to eradicate the "substantially advance" standard. Empirical analyses and the record in a number of district court cases demonstrate that mobile homes can have established values of $10,000 or less but can sell for as much as $500,000, because tenants are compelled to purchase the expected, risk-adjusted present value of all future rent control savings with

the home. The record in these cases together with basic economic principles demonstrates that, in particular, California's mobile home rent control has no reasonable relationship to any proffered public purpose, reduces the supply of affordable housing, and makes housing less accessible to those with fewer resources.

Municipalities in California have used the guise of mobile home rent control to transfer hundreds of millions of dollars of real estate value from politically vulnerable landowners to politically powerful local constituents, without promoting a public purpose. *See, e.g.*, John M. Quigley, *Economic Analysis of Mobile Home Rent Control: The Example of San Raphael, California* (Sept. 12, 2002); John M. Quigley, *The Economics of Mobile Home Rent Control in Santee, California* (Mar. 19, 2004); John M. Quigley, *The Economics of Mobile Home Rent Control: A Case Study of Goleta, California* (Aug. 11, 2004). At a minimum, the "substantially advance" standard should continue to apply to circumstances in which rent control regulations may give rise to a premium.

As demonstrated in Part II, this case provides no basis for this Court to revisit its decisions in *Nollan*, *Yee*, and two decades of jurisprudence that establishes that the "substantially advance" standard should apply to regulatory takings. Petitioner's effort to write the "Public Use" clause out of the Property Clause is without basis.

Certainly, in the context of a physical taking, the government does not have the power to take property absent a reasonable nexus to a public purpose, regardless of whether it pays compensation. "To be sure, the Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.'" *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (citations omitted). There is no basis to reach a contrary result in the regulatory taking context. In fact, this Court has repeatedly



recognized that the "Public Use" requirement is equally applicable to regulatory takings.

Petitioner contends that judicial review of the "reasonableness" of regulations under the "substantially advance" standard would return courts to the *Lochner* era. But application of the "substantially advance" standard does not require any policy judgments about the reasonableness or wisdom of legislative decisions. Rather, it focuses the judicial inquiry on a narrow factual question, familiar to judges and juries, whether a regulation actually advances its objective. That standard is a familiar one in the First Amendment context. To ensure that property rights are not taken for purely private purposes, that limited inquiry is vital.

Finally as set forth in Part III, there also is no basis to disturb the Ninth Circuit's application of the "substantially advance" standard in the circumstances presented in *Yee – i.e.*, rent control regulations that may result in a premium. The Ninth Circuit has been careful not to second-guess the validity of legislative purposes or the reasonableness of regulations. The "substantially advance" standard has been appropriately applied by the Ninth Circuit both in the instant case and in the context of mobile home rent control regulations that otherwise would transfer billions of dollars of windfall value to local constituents, without advancing any public purpose.

## I. THIS COURT SHOULD TAKE NOTE OF THE EGREGIOUS CONSEQUENCES OF CALIFORNIA'S MOBILE HOME RENT CONTROL IN DETERMINING WHETHER TO APPLY THE "SUBSTANTIALLY ADVANCE" STANDARD TO RENT REGULATIONS THAT MAY GIVE RISE TO A PREMIUM.

This Court's decision in *Yee v. City of Escondido* concerned a particularly draconian form of rent control, California's mobile home rent control. This form of rent control has two unique characteristics. First, as with all mobile home rent

control (but unlike apartment rent control), ownership of the land and the physical structure are separate. Second, under the California Mobilehome Residency Law, Cal. Civ. Code § 798 et seq. (West 1982 and Supp. 1991), a mobile home landlord cannot terminate the tenant's right to occupancy, except for cause. Thus, as this Court recognized in *Yee*, the departing tenant can stay at the property as long as she wants.

These two unique characteristics allow a tenant to sell a mobile home located in place on an existing plot for an amount that includes a premium. Like "key money," the premium represents the discounted value of the future rent savings. Effectively, such regulation licenses the tenant to resell all regulatory benefits associated with the tenant's leasehold, for an amount representing the value of those benefits in perpetuity. In fact, the tenant is receiving value that, in the absence of the regulation, the property owner could charge as rent based upon the market value of the real estate. As discussed below, this unique type of regulation has pernicious effects – it increases the cost and inaccessibility of housing – and cannot reasonably further any purpose other than effecting a one-time transfer of wealth to a private group.

### A. Economists Broadly Agree that Rent Control Leads to a Reduction in the Supply of Affordable Housing.

Economists generally believe that all forms of rent control will ultimately reduce the supply of affordable housing. But even if some forms of rent control serve a valid public purpose, California's mobile home rent control does not: any regulatory benefits necessarily will be capitalized and sold at full value. Because mobile homes can be purchased only by those who can afford to purchase these regulatory benefits in a lump sum transaction, access to rent-controlled housing is denied to those who do not have what can be the hundreds of thousands of dollars (or comparable credit) needed to purchase the premium. As a consequence, those most in need of affordable housing will receive no benefit whatsoever. The



only beneficiary is the tenant who happens to be renting the land when the regulation is enacted, who receives a windfall equal to all future rent control savings.

In one case, *MHC Financing Ltd. Partnership v. City of San Rafael*, 00-C-3785 VRW (N.D. Cal.) (under submission pending the outcome of this case), expert testimony was presented by several of the nation's leading economists and experts on affordable housing, including Professor Daniel Fischel, former Dean of the University of Chicago Law School, Professor John Quigley (one of the *amici* here), and Professor Robert Edelstein (also an *amici* here). They demonstrated through empirical analysis that the premium, representing the difference between the selling price of the home and its intrinsic value, simply capitalized any rent savings. Dr. Quigley demonstrated using standard statistical methods that reductions in rents were reflected in substantial increases in monthly housing cost associated with purchasing the mobile home. As discussed below, the consumer is not indifferent to whether the dollar must be paid in the form of rent or in the form of a mortgage cost: those with least access to capital will be unable to finance the purchase of the home.

Although economists disagree on many things, there is clear consensus concerning the effects of rent control: these regulations lead to reductions in the quality and quantity of housing available to consumers. *See* Richard M. Alston, J. Kearl and M. Vaughn, *Is There a Consensus Among Economists in the 1990s?* 82 Am. Econ. Rev. 203-09 (1992). Recent scholarly work (*e.g.*, Bengt Turner and Stephen Malpezzi, *A Review of Empirical Evidence on the Costs and Benefits of Rent Control*, 10 Swedish Econ. Pol'y Rev. 11-56 (2003)) only reinforces the survey of opinions reported by Alston, Kearl, and Vaughn a decade earlier on the effects of rent control:

*First,* over time, below market rents are typically not distributed to those in need. "Lucky-in-place" residents benefit at the expense of new households and immigrants from

other regions. Kaushik Basu & Patrick M. Emerson, *The Economics of Tenancy and Rent Control*, 110 Econ. J. 939-62 (2000). Below-market rents are not allocated to those who value them the most. *See* Edward L. Glaeser & Erzo F.P. Luttmer, *The Misallocation of Housing Under Rent Control*, 93 Am. Econ. Rev. 1027-46 (2003) (emphasizing that these social costs are quite large because housing is scarce); Edgar O. Olsen & David M. Barton, *The Benefits & Costs of Public Housing in New York City*, 20 J. Pub. Econ. 299-332 (Apr. 1983).

*Second,* housing suppliers see the economic value of their properties decline, and they react by reducing maintenance expenditures. The incentive to invest capital to produce new housing is inexorably reduced. Reduced supply makes housing more costly for consumers at large. *See* Richard Arnott, *Rent Control*, in The New Palgrave Dictionary of Economics and the Law (1998).

*Third,* artificially low rents lead to excess demand for housing, to the hoarding of rent-controlled units, and to reduced household mobility. The popular literature is replete with anecdotes describing how rent control leads to housing that is hoarded by those who are not the most in need. *See, e.g.,* Kenneth Auletta, *And the Streets Were Paved with Gold* (1979).

**B. Mobile Home Rent Control Is a Unique Form of Rent Control that Does Not Advance Any Legitimate Purpose.**

Beyond the social costs inherent in all rent control, mobile home rent control represents a substantially different form of rent control that lacks a reasonable nexus to any public purpose. There are two important differences in the institution of rent control when it is selectively applied to mobile homes. First, there is a divided ownership in mobile home parks: the owner of the mobile home typically owns only the housing



unit and rents a site in a mobile home park on which the home is situated. Second, the rent control regulations are imposed on only a small portion of the local housing market, namely those dwellings in mobile home parks. Prices in the larger housing market are set by supply and demand, not by regulation.

Because of divided ownership, every tenant must pay in full for the benefits that the regulation would otherwise provide. The tied sale of the home together with the right to occupy a below-market site is analytically equivalent to a payment of "key money" in apartment rent control. These tied transactions are invariably illegal under apartment rent control ordinances, but are *inevitable* under mobile home rent control ordinances.

The fact that mobile homes are usually a small portion of the local housing market means that housing prices in the area are set by the forces of supply and demand, and rent control rules have little or no impact on prices in this larger market. Increased demand produces upward pressure on mobile home prices as well as on the prices of condominiums, apartments, and singe-family homes. The right to occupy a site at a below-market rent simply increases in value and will be sold at a premium reflecting the discounted rent savings. And those with the least amount of capital or access to capital will least be able to afford that premium.

**C. California's Mobile Home Rent Control is the Paradigm of a Regulation That Confers No Public Benefit.**

Mobile home rent control in California is yet an even more egregious institution. California mobile home tenants are granted life estates in the land and the ability to transfer such life estates to a third party, municipalities are unrestrained in their ability to limit rent, and the economic burden often falls on one or two landowners. In fact, California municipalities

have effectively conferred on a fortuitous group of existing tenants the right to sell to the purchaser of their mobile home a) the tenant's own artificially below-market rents; b) a license to receive the benefits of discounted rents for the purchaser's life estate; and c) a license to resell those benefits in perpetuity. Under the guise of selling a mobile home, selling tenants thus compel purchasers of their homes to pay for this bundle of property rights that, absent the regulation, would belong to the property owner.

Some California municipalities have simply frozen rents. Others limit annual increases to a fraction of the increase in the CPI, and the CPI increases at a fraction of the rate of the increase in housing prices in coastal communities. Annual increases at a fraction of the CPI, such as the .75 percent CPI limitation challenged in *MHC Financing Ltd. Partnership v. City of San Rafael*, 00-C-3785 VRW (N.D. Cal.), lead to an exponentially expanding gap between permitted rents and market rents.

If California municipalities are not subject to meaningful constitutional constraint, they will impose draconian rent limitations, setting rents at half the market rent or less, and effectively use the guise of regulation to transfer the value of real property from an often out-of-state owner to a select group of local constituents, without advancing any public purpose.[3]

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[3] The phenomenon of capitalization is well known in real estate markets where the advantages of better schools or lower tax rates are reflected in the selling price of dwellings. *See* Wallace E. Oates, *The Effects of Property Taxes and Local Public Spending on Property Values: An Empirical Study of Tax Capitalization and the Tiebout Hypothesis*, 77 J. Pol. Econ. 957-71 (1969). Similarly favorable contractual terms of assumable mortgages are capitalized in the selling price of single family homes. *See* Dan Durning & John M. Quigley, *On the Distributional Implications of Mortgage Revenue Bonds and Creative Finance*, 38 Nat'l Tax J. 513-24 (1985). There is every reason to expect that any perpetual rent control savings will be fully capitalized in the purchase price and the cost of housing will not be reduced.



While a "legitimate and rational goal of price or rate regulation is the protection of consumer welfare," *Pennell v. City of San Jose*, 485 U.S. 1, 13 (1998), when the benefits of the regulation are fully capitalized there is *no* enhancement of the consumer welfare. Only the initial recipients of the premium are better off. And a one time transfer of wealth from a single landowner to a random group of local beneficiaries does not qualify as a public purpose.

***1. Mobile Home Rent Control Makes Housing Less Affordable and Less Accessible.***

Requiring a lump sum payment for future rental savings is not economically neutral – it creates a barrier to entry. By capitalizing future rent savings and making housing available only to those who can afford to pay the capitalized cost up front, California's mobile home rent control makes housing less accessible to low-income individuals.

Those on fixed incomes and with poor credit history may be able to pay a particular rent, but will generally be unable to afford a lump sum payment equal to the value of future rent savings. And, because lenders view low-income borrowers as a riskier investment, individuals with low incomes must spend more than those with higher incomes on interest expense in order to gain access to the same amount of capital. As discussed below, these lump sum premiums or barriers to entry are often worth hundreds of thousands of dollars in California. Few low-income individuals can qualify to pay several hundred thousand dollars for a mobile home that otherwise would sell for $10,000 or less.

The practical consequences of this rent control scheme is reflected in the evidentiary record of various cases in which the constitutionality of this scheme has been challenged. In one such case, *Manufactured Home Communities, Inc. v. City of Santa Cruz*, C 00-20630 (JF), the allegations reflect that mobile homes with minimal intrinsic value were selling for as

much as $500,000 – reflecting principally the present value of the perpetual license to use the land at below-market rents.

Mobile home values are reflected in various "blue books" and "cost guides." Many have established resale values of less than $10,000. Certain makes and models pre-date the current HUD codes and are obsolete; these homes generally have only salvage value, if any value at all. However, these obsolete homes are selling in rent control jurisdictions for hundreds of thousands of dollars. It is apparent that what the tenants are selling, along with the *de minimis* value of the home itself, is the value of the license to perpetual rent savings.

In fact, Dr. Quigley has conducted independent analyses of three different California markets in which there is mobile home rent control: San Rafael, Goleta, and San Diego. He found that rent savings were capitalized into increased selling prices for mobile homes. Thus, in each case, the regulation impeded access to affordable housing.

***2. Mobile Home Rent Control Does Not Advance Any Other Public Purpose.***

Recognizing that mobile home rent control reduces the affordability and accessibility of housing, certain municipalities have now concocted new purported government purposes to rationalize their raw transfer of property rights. Some contend that the regulations serve to preserve a tenant's "equity" in the mobile home. But the only differential in the sale price of a mobile home that is caused by rent control is an artificial premium representing the value of the regulation itself. Yet the value of the regulation is not "equity" that belongs to a tenant. And if later tenants receive more upon resale than they would absent the regulation, that is only because they were forced to pay more, *i.e.*, the premium, when they purchased. There is no net benefit.

Another putative rationale for mobile home rent control is to preclude "unreasonable rent increases." Any reduction in



rents must be purchased in full through the payment of a premium, however, equal to the value of the discounted rents. Compelling the pre-payments of rents in the form of a premium discriminates against and excludes from the market those with the least resources and weakest access to credit. Moreover, mobile homes are part of a broader housing market and thus a mobile home park owner has no ability to extract monopoly or oligopoly prices from renters. There is no mobile home rent control in 48 states and there is no documented record of monopoly pricing in those states.

**D. The Conduct of Municipalities in Applying Mobile Home Rent Control Demonstrates that the Democratic Process Will Result in a "Land Grab" by Local Constituents, Absent Meaningful Judicial Review.**

Additionally, the record in the California mobile home park cases demonstrates that meaningful judicial review of mobile home park rent control is particularly necessary because of the risk that local legislatures will be unduly subject to local constituent pressures. Politically powerful local interests have actively lobbied local officials to take property from out-of-state owners. If this Court does not protect property rights in these circumstances, those rights can simply be taken by local government for the singular benefit of a discrete group of private constituents.

As but one example, in the San Rafael case, the city reached a settlement agreement in which it agreed to allow rents to be adjusted to market when new tenants moved in. The City Manager publicly acknowledged that the sale price of mobile homes had "skyrocketed as a result of the [rent control] ordinance." However, when the local residents descended upon City Hall, claiming that their homes would sell for hundreds of thousands of dollars less (thereby making housing more affordable) without the ability to resell the benefits of the rent control legislation, the City Council simply refused to abide by its agreement to modify the law. Mobile homes in

that community now sell for ten times their actual value and more.

Absent constitutional constraints and meaningful judicial review, there will be no meaningful limit on the ability of local governments to simply take property and/or much of its value from out-of-state owners and transfer it to a small group of local constituents. The mobile home rent control experience in California shows that this Court has a critical role to play in protecting property rights, because the local political process is beholden to existing residents. And, because there is often only one mobile home park in a municipality, the burden of regulation often falls on a single landowner.

Petitioner offers no reason why this Court should categorically reject the "substantially advance" standard. To the contrary, that standard serves an important function in giving effect to the Public Use clause of the Property Clause.

## II. TWO DECADES OF JURISPRUDENCE ESTABLISH THAT THE "SUBSTANTIALLY ADVANCE" STANDARD SHOULD APPLY TO REGULATORY TAKINGS.

This Court has recognized that regulations may deprive a citizen of their private real property in a manner that is comparable to a partial physical taking. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg. Planning Agency*, 535 U.S. 302, 325-26 (2002) (recounting that Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) gave birth to the regulatory taking doctrine by recognizing that protections against physical appropriations of private property would be meaningless if the government could redefine the range of property interests through regulation). Thus, this Court has recognized for over eighty years that, "if [a] regulation goes too far it will be recognized as a taking." *Id.* at 326 (quoting *Pennsylvania Coal*, 260 U.S. at 415).

When a regulation so burdens private real property as to constitute a taking, there must be some judicial scrutiny of



whether the governmental burden on private property actually advances a valid purpose of government – just as there is when the taking is physical. Absent that inquiry, local governments would have unbridled authority to transfer the value of real property from its owners, to favored private constituents, without promoting any legitimate purpose of government.

In the physical taking context, the only issue is whether the use of the land is a public use, *i.e.*, the taking is for a public purpose. If it is, there is no question that dedication of the land to that public purpose will substantially advance the public purpose. By contrast, in the regulatory taking context, it is not sufficient that the purpose is a public purpose. The purpose may be a valid public purpose, such as promoting beach access, but if the regulation has no reasonable nexus to that purpose, the public use requirement is not met. Thus, in the regulatory taking context, there must be a reasonable causal relationship between the regulation's effect and its purpose – it must substantially advance the purpose. If it does not, the taking exceeds the government's authority to take property rights, regardless of whether there is just compensation.

In the context of a potential regulatory taking, the Property Clause requires three separate inquiries:

1) Is the regulatory burden on the property sufficiently substantial to qualify as a "taking" that warrants application of the Property Clause? If not, the Property Clause is no longer relevant.

2) If there has been a regulatory taking, does it comport with the Public Use clause of the Property Clause? If not, just compensation is irrelevant and the regulation is invalid.

3) Finally, if there has been a regulatory taking that comports with the Public Use clause, what just compensation is due?

Petitioner essentially tries to write the second question out of this Court's jurisprudence and the Public Use clause out of the Property Clause.

Although this Court has recognized different standards for determining whether there is a sufficient nexus between the effect of a regulation and a public purpose (compare *Dolan v. City of Tigard*, 512 U.S. 374 (1994) to *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987)), it has never countenanced the radical suggestion, made by petitioner, that such a nexus inquiry is inappropriate altogether. In fact, as this Court stated in *Tahoe-Sierra*, "[a]fter [*Pennsylvania Coal Co. v.*] *Mahon*, neither a physical appropriation *nor a public use* has ever been a necessary component of a 'regulatory taking.'" 535 U.S. at 326 (emphasis added). In essence, a regulatory taking can be found when no public purpose is substantially advanced.

**A. The Substantially Advance Standard Provides An Appropriate Level Of Scrutiny For Regulations That Burden Real Property.**

In *Yee*, this Court appeared to recognize that the appropriate standard for a real property rent regulation that may result in a premium is the substantially advance standard. 503 U.S. at 533-34. The certiorari petition in *Yee* sought review of whether, as the Ninth Circuit had then determined, California's mobile home rent control constituted a physical taking. This Court concluded that because the landowner had voluntarily rented his land and the record was unclear as to whether the owner could close the park and devote it to another use, a physical taking had not been established on the record before it. But this Court noted that there may be a regulatory taking, because the "regulation goes too far...." *Id.* at 529 (quoting *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922)).

This Court focused on the significance of the premium, representing the present value of future rent savings, in



determining whether the regulation complied with the Property Clause. This Court recognized that this mobile home rent control, unlike certain other forms of rent control, "cause[s] a one-time transfer of value...." *Id.* at 529. This Court acknowledged that the "ordinance benefits incumbent mobile home owners without benefiting future mobile home owners" and that "Petitioners are correct in citing the existing of this premium as a difference between the alleged effect of the [mobile home rent control] ordinance and that of an ordinary apartment rent control statute." *Id.* at 530.

In *Yee*, this Court also recognized that because of the premium, the mobile home rent control ordinance "transfers wealth only to the incumbent mobile home owner." *Id.* This Court noted further, "[t]his effect might have some bearing on whether the ordinance causes a *regulatory* taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance. *Id.* (citing *Nollan*, 483 U.S. at 834-35).

This Court's discussion in *Yee* of the applicability of the substantially advance standard is consistent with the numerous other decisions in which this Court has applied the "substantially advance" standard to regulations that limit the uses of real property, including *Nollan*. Application of the Due Process standard in these circumstances is fundamentally inconsistent with this Court's jurisprudence. Unlike an economic regulation in which no "specific property right or interest has been at stake," *Eastern Enterprises v. Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J. concurring), the right to determine rent for real property is an integral part of the bundle of rights associated with the ownership of that property. *See Yee*, 503 U.S. at 528 ("the state and local laws at issue here...regulate [the] use of their land").

***1. This Court Has Consistently Applied the Substantially Advance Standard For Over Two Decades.***

In addition to its decision in *Yee*, this Court has been consistent in its application of the substantially advance standard to regulations that limit the use of real property for over two decades. In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), this Court concluded that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose." *Id.* at 127.

In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), this Court recognized that "[t]he application of a general zoning law to particular property" requires a judicial determination of whether the ordinance "substantially advance[s] legitimate state interests...." *Id.* at 260.

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court recognized that a use restriction must be "reasonably necessary to the effectuation of a substantial public purpose." *Id.* at 834 (quoting *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978)).

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), this Court established an even more stringent standard than the "substantially advance" standard in circumstances involving a land use exaction. This Court rejected a "reasonable relationship" standard because it "seems confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause...." *Id.* at 391. This Court adopted a "rough proportionality" standard for exactions, that demands an "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.*

In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 700-704 (1999), this Court reaffirmed that "concerns for proportionality animate the Takings Clause" and



affirmed jury instructions that required jurors "to decide if the city's decision here substantially advanced any such legitimate public purpose...." In doing so, this Court noted that such "instructions are consistent with our previous general discussions of regulatory takings liability." *Id.* at 704.

More recently, in *Tahoe-Sierra Preservation*, this Court specifically referenced that the petitioner might have argued that the regulation "did not substantially advance a legitimate state interest..." but failed to do so. 535 U.S. at 334.

Petitioner offers no justification for jettisoning two decades of jurisprudence. And if there were any doubt about the wisdom of this Court's decisions, this Court need only consider the ability of politically powerful tenants to appropriate property, under the guise of regulation. This Court need look no further for an example of such appropriation than the circumstances presented in *Yee*, *i.e.*, California's mobile home rent control schemes.

***2. The Substantially Advance Standard Does Not Invite Judicial Second-Guessing of Legislative Judgments.***

The "substantially advance" standard is a moderate one. It does nothing more than ensure that the regulation is reasonably necessary to the effectuation of such a public purpose. It does not permit second-guessing as to the legitimacy of a legislative purpose. Rather, it merely requires a reasonable nexus between that purpose and the effect of the regulation.

In *Del Monte Dunes*, this Court expressly rejected the very argument made by petitioner here – that the "substantially advance" standard would allow "juries to second-guess public land-use policy." 526 U.S. at 704. This Court recognized that the substantially advance standard does not allow the courts to second-guess whether a public purpose is a legitimate public purpose. Rather, the standard limits judicial review to a different question: assuming the public purpose to be valid, whether the regulation substantially advances that public

purpose. *Id.* at 704-05. In fact, the jury in *Del Monte Dunes* was instructed that the various purposes asserted by the city were legitimate public purposes.

The courts are accustomed to making judgments about whether regulations actually advance a public purpose. That standard has been applied consistently in the First Amendment context. *See Thompson v. Western States Medical Center*, 535 U.S. 357, 367 (2002) (determining "whether the regulation directly advances the governmental interest asserted....") (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)). The standard does not invite judicial activism when applied to property rights, any more than it does when applied to protect commercial speech.

While such judgments may occasionally be complex, they are nonetheless appropriate judicial determinations that have been made by judges and juries for many decades now. *See Tahoe-Sierra Preservation,* 535 U.S. at 323 (noting that regulatory takings cases require "complex factual assessments of the purposes and economic effects of government actions") (citing *Yee*, 503 U.S. at 523). As discussed below, the judiciary is the right branch of government to make such complex factual assessments. That is particularly so because there is a risk that the democratic process will reflect the rule of a self-interested "mob" that seeks to take the private property of a politically ineffectual landowner and make it their own.

***3. Meaningful Judicial Scrutiny of Regulations that Burden Real Property and May Cause a Premium to Result Is Necessary Because No Compensation or Forum for Challenging the Burden Is Provided by the Government.***

Regulatory takings warrant meaningful judicial scrutiny under the Public Use clause, precisely because the government



is not willing to provide compensation or a forum for challenging whether there is a public use. *See Del Monte Dunes*, 526 U.S. at 712-13 ("[W]hen the government initiates condemnation proceedings, it concedes the landowner's right to receive just compensation....Liability simply is not an issue....[But] where...the government not only denies liability but fails to provide an adequate post-deprivation remedy...the disadvantage to the owner becomes all the greater....").

In the eminent domain context, the government acknowledges that it is using the property, and the constitutional inquiry is appropriately deferential to what the government has determined to be a public use. When government regulates real property, it will invariably identify a public use (or purpose) to justify the regulation. But if the regulation does not substantially advance that public purpose, then real property rights have not, in fact, been put to a public use. The result in that circumstance should be no different than if the real property had been physically confiscated and transferred to a private party – that government action is invalid under the takings clause. Thus, the result of a regulation that identifies a purpose but fails to substantially advance it is no different from the government taking land for a highway but then giving it to a private citizen.

Without meaningful judicial scrutiny of the effect of a regulation, there is no means to ensure that the government has not used the guise of regulation to avoid its obligation to compensate a property owner for a burden that should be borne by the public as a whole. *See Nollan*, 483 U.S. at 837.

Additionally, in contrast to a general economic regulation, where a regulation burdens real property, the burdens necessarily fall upon particular landowners, rather than the public as a whole. As a consequence, there is a heightened risk that a burden which ought to be borne by the public as a whole will be borne only by a private party. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960) (Taking Clause "was designed

to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."); *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492 (1987) (quoting *Agins*, 447 U.S. at 260-61) ("[A] taking, is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest…").

***4. Petitioner's Interpretation of the Property Clause Would Read the Public Use Clause out of the Constitution.***

Petitioner argues that the only substantive constitutional requirement that the government advance a public purpose in regulating real property is found in the Due Process Clause. (Pet. at 23-24). This argument would effectively read the "public use" condition out of the Property Clause and would require this Court to reverse its decisions in *Nollan*, *Del Monte Dunes*, and *Dolan*, and to contradict its analyses in *Agins*, *Yee*, *Brown*, *Tahoe-Sierra* and other cases.

In *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), this Court recognized in the context of a regulatory taking, that the "text of the Fifth Amendment imposes *two* conditions on the exercise of [the state's] authority: the taking must be for a 'public use' *and* 'just compensation' must be paid to the owner." *Id.* at 231-32 (emphasis added). The "substantially advance" standard gives effect to the first condition – it serves to ensure that, in the regulatory taking analysis, there is a reasonable relationship between the burden on property and the public purpose the government seeks to advance.

As noted, the Public Use clause is indisputably applicable to physical takings. A "purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be



void." 467 U.S. at 245. There is no apparent reason to dispense with this textual constitutional requirement merely because the taking is accomplished by regulation.

Failure to treat the "public use" clause as an essential condition of governmental regulations that burden real property would gut the Property Clause of any significance, other than to ensure compensation. It would license the government to take any property rights that it wants, without regard to whether it is advancing a legitimate purpose of government, provided it do so by regulation rather than through a condemnation. Where the government directly invokes its eminent domain power, a landowner is afforded a forum in which to challenge whether the action is for a "public use." The government should not be permitted to avoid that inquiry merely because it takes property rights through regulation, rather than through eminent domain.

**B. The Substantially Advance Standard is Particularly Appropriate In Reviewing a Rent Regulation.**

This Court has applied and recognized the "substantially advance" standard in a wide variety of circumstances involving restrictions on the use of real property. *See* Section II, *infra*. As reflected by the discussion in *Yee*, a rent regulation is functionally no different than a "use" regulation – by limiting what rent a landlord may charge for property, the regulation necessarily limits the uses to which it may be put. Thus, in *Yee*, this Court recognized that the substantially advance standard would be the appropriate standard for evaluating whether mobile home rent control gives rise to a regulatory taking.

Similarly, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), Justice Kennedy's pivotal opinion recognized that whether a regulation constitutes a taking may turn on whether it affects a property interest. *Id.* at 540 (Kennedy, J., concurring) ("[The regulation] does not operate upon or alter an

identified property interest, and is not applicable to or measured by a property interest."). Rent control operates on a real property interest and deprives the owner of the most valuable property interest in the land – the power to determine the price at which the owner is willing to rent the land.

And in the context of mobile home rent control, the burden often falls on a small group of landowners. *See Nollan*, 483 U.S. at 835 n.4 ("If the Nollans were being singled out … the State's action, even if otherwise valid, might violate the incorporated Takings Clause…."). The substantially advance standard is minimally necessary to protect owners of real property from the disproportionate burden that mobile home rent control will otherwise impose.

**C. The Application of the Substantially Advance Standard is Particularly Appropriate Where There is a Likelihood of a Premium.**

Moreover, even if there were somehow a basis for not applying the "substantially advance" standard to all real property rent regulations, there is particular reason to apply it to real property rent regulations that may give rise to a premium. In *Nollan*, this Court recognized that heightened risks that a regulation will serve no purpose warrant increased scrutiny:

> As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a "substantial advanc[ing] of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context *there is heightened risk that the purpose is avoidance of the compensation requirement,* rather than the state police-power objective.

*Id.* at 841 (emphasis added).



When a rent regulation may give rise to a premium, there is precisely such a heightened risk. As this Court recognized in *Yee*, the absence of a mechanism to prevent a premium suggests that the purpose of the regulation may be to transfer the value of property from one private party to another, without providing compensation. The risk is heightened because a premium reflects that the regulation will be ineffectual or even, as with mobile home rent control, counterproductive in achieving its stated purpose.

Thus, petitioner provides no reason to revisit this Court's consistent application of the "substantially advance" standard to vindicate the important property interests that are protected by the Public Use clause of the Property Clause. And, as set forth below, in no event should this Court question the application of that standard in the egregious circumstances presented by California's mobile home rent control.

## III. THERE IS NO BASIS TO DISTURB THE NINTH CIRCUIT'S APPLICATION OF THE SUBSTANTIALLY ADVANCE STANDARD IN THIS CASE OR IN THE CONTEXT OF CALIFORNIA'S MOBILE HOME RENT CONTROL.

Consistent with this Court's discussion in *Yee* and its many affirmations of the substantially advance standard, the Ninth Circuit has appropriately applied that standard to California's mobile home rent control and other rent regulations that fail to provide a mechanism to prevent the creation or transfer of a premium.

**A. The Ninth Circuit Has Faithfully Applied This Court's Decisions.**

In *Richardson v. City & County of Honolulu*, 124 F.3d 1150, 1164 (9th Cir. 1997), the Ninth Circuit faithfully recounted this Court's analysis in *Yee*. It considered a rent regulation that the District Court had found would create a premium that an "owner-occupant can capture when she sells a

condominium subject to a re[gulated] land rent" and in which the transferor will "charge a premium reflecting the net present value of the difference between the [regulated] land rent and the free market land rent." *Id.* at 1165. The District Court found this regulation "effected a transfer of wealth from lessors to lessees" that "does not occur in the ordinary rent control ordinance...." *Id.*

The Ninth Circuit also recognized in *Richardson* that, under this Court's decision in *Nollan*, "[l]and use regulations do influence the value of property, but to be constitutional, they must do so in a manner that substantially furthers a legitimate government purpose." *Id.* It found that the rent regulation at issue did not advance a government purpose because

> [t]he absence of a mechanism that prevents lessees from capturing the net present value of the reduced land rent in the form of a premium, means that the Ordinance will not substantially further its goal of creating affordable owner-occupied housing in Honolulu. Incumbent owner occupants who sell to those who intend to occupy the apartment will charge a premium for the benefit of living in a rent controlled condominium. The price of housing ultimately will remain the same.

*Id.* at 1166.

More recently, the Ninth Circuit applied the "substantially advance" standard to the factual context presented in *Yee*: California's mobile home rent control. It recognized that, generally, a mobile home rent control ordinance that does not provide for a mechanism to prevent the capture of a premium will not substantially advance any government purpose. *Cashman*, 374 F.3d at 896. In *Cashman*, notwithstanding the demonstrated pernicious effects of California's mobile home rent control, the Ninth Circuit exercised appropriate restraint and recognized that, in some case, there may be externalities



that prevent a premium from arising. *Id.* at 899. Its decision was consistent with this Court's every discussion of the "substantially advance" standard.

**B. This Case Was Correctly Decided.**

In this case, the Ninth Circuit properly applied these principles to Hawaii's regulation of independent dealer-leases. The Ninth Circuit recognized that, notwithstanding the absence of a mechanism to preclude a premium, there was some possibility that a premium would not be created or transferred – because Chevron might recoup any lost rent through increased gasoline prices. Thus, the Ninth Circuit appropriately required a trial on whether the regulation had a reasonable nexus to its legislative purposes. That inquiry was no different than the inquiry that this Court approved in *Del Monte Dunes*. Whether or not the District Court properly weighed the evidence before it, there is no reason to depart from the "substantially advance" standard in connection with a rent regulation that lacked a mechanism to prevent a premium.

This case, like cases involving mobile home rent control, concerns a substantial burden on real property. It concerns the most fundamental stick in the bundle of property rights – the right to determine what compensation a property owner may ask or receive for the use of one's property. The setting of price will invariably affect the use of the property. A property owner whose revenue is limited, is limited in the improvements he or she can make to the land. There is no more fundamental aspect of a market society than the ability to set price; there is no greater danger to the free enterprise system than when the government sets prices.

Consistent with *Richardson* and *Cashman*, this case raises unique factual questions regarding whether "externalities" preclude a premium. This case raises factual issues as to whether the property owner was economically injured by the regulation, or whether it was able to recoup its lost rent

through increased gasoline prices. It also raises factual issues as to whether, unlike the housing market, there are sufficient unregulated suppliers to ensure an effective market. The case raises a factual issue as to whether the regulation lowered the price of gasoline or otherwise substantially advanced any legitimate purpose. But the complexity of those factual issues provides no grounds to revisit a well-established and highly functional legal standard.

To the contrary, lest this Court harbor any doubt, the well-established failures of California's mobile home rent control, and the breakdown of the democratic process in connection with it, demonstrate the wisdom and necessity of meaningful judicial scrutiny of whether rent regulations substantially advance a legitimate purpose.

## CONCLUSION

The substantially advance standard serves an important purpose in giving effect to the Public Use clause of the Property Clause. It is particularly appropriate where rent regulations result in premiums that reflect a capitalization of any benefits the regulation may otherwise provide. This Court should affirm the decision of the Ninth Circuit in this case. And in no event should it revisit the applicability of the "substantially advance" standard in the context of California's uniquely pernicious mobile home rent control.

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